

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS G. MOODY,

Petitioner,

vs.

Civil Action 2:09-CV-118
Judge Frost
Magistrate Judge King

MICHAEL R. JAKUBOW,

Respondent.

REPORT AND RECOMMENDATION

This is a habeas corpus action under 28 U.S.C. §2254 in which petitioner sought to challenge his 2002 state court conviction for murder with a firearm specification and felonious assault. On May 11, 2009, the petition was dismissed as untimely under 28 U.S.C. §2244(d). *Order*, Doc. No. 21; *Judgment*, Doc. No. 22. Petitioner filed a notice of appeal, Doc. No. 24, but his request for a certificate of appealability was denied by this Court, *Order*, Doc. No. 25, and by the Court of Appeals, *see Order*, Doc. No. 26. Moreover, on July 1, 2010, the United States Court of Appeals for the Sixth Circuit denied petitioner leave to pursue a second or successive petition. *See Order*, Doc. No. 27. This matter is now before the Court on petitioner's April 19, 2011 *Motion for Relief from Judgment*, Doc. No. 28.

In his motion, petitioner invokes the provisions of Rule 60(b)(4) of the Federal Rules of Civil Procedure, which authorizes relief from a final judgment where "the judgment is void." Petitioner appears to argue that the state court judgment resulting in petitioner's conviction was void; Rule 60, petitioner contends, therefore permits and

indeed requires this Court to grant him relief from that state court judgment.

Petitioner has misapprehended Rule 60(b)(4) of the Federal Rules of Civil Procedure. The rule permits relief from a void federal judgment; it does not provide an independent basis for a federal challenge to a state court criminal conviction. Petitioner presents no basis for concluding that this Court's May 11, 2009 judgment was void. Rule 60 of the Federal Rules of Civil Procedure therefore affords no basis for vacating that judgment.

It is therefore **RECOMMENDED** that petitioner's *Motion for Relief from Judgment*, Doc. No. 28, be denied.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within fourteen (14) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. F.R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*,

638 F.2d 947 (6th Cir. 1981).

s/Norah McCann King
Norah McCann King
United States Magistrate Judge

May 25, 2011